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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 787

BERNARD J. AND MARY D. OHLENDORF,
Appellants,

v.

GARNETT AND MARTHA GAYLES,
PYRAMID BLDG. & LOAN ASSOCIATION,
PEARSON SUNDERLAND, JR., PRESIDENT, INDIVIDUALLY AND T/A SUN LAND CORP.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

MOTION TO DISMISS OR AFFIRM

Appellee, Pearson Sunderland, Jr., President, Individually and T/A Sun Land Corp., and Appellee, Pyramid Bldg. & Loan Association, move the Court to dismiss the appeal herein or that the final judgment of the Baltimore City Court and the action of the Court of Appeals of Maryland be affirmed on the following grounds:

1. No Federal or constitutional question is presented by this appeal.

2. The alleged Federal questions sought to be reviewed were not properly raised.

3. The alleged Federal questions involving the issues presented were not expressly passed on by the Court of Appeals of Maryland.

STATEMENT

The facts as set forth in Appellants' Jurisdictional Statement show that Appellants sold their leasehold property and improvements thereon known as 1352 Homestead Street, Baltimore City, Maryland, to Appellees, Garnett and Martha Gayles (hereinafter referred to as "Gayles") for a purchase price of $9,000.00. In order to obtain financing from Appellee, Pyramid Bldg. & Loan Association (hereinafter referred to as "Pyramid") so that said sale could be consummated, the Appellants hypothecated or pledged the sum of $2,500.00 so that Pyramid would loan to Gayles sums necessary to complete said purchase. Settlement for said property was held, title transferred to the Gayles, who executed a mortgage to Pyramid, and Appellants executed a hypothecation agreement which provided, among other things, that in the event of foreclosure and sale for a sum less than sufficient to net Pyramid the amount of its claim, Pyramid was authorized to deduct from said sum so hypothecated such amount as would be sufficient to make good any deficiency.

Subsequently, after default by Gayles in the repayment of the mortgage to Pyramid, Pyramid instituted foreclosure proceedings as provided for in said mortgage and in conformity with Article 66 of the Annotated Code of Maryland (1957 Edition) 1968 Replacement Volume in the Cir-

cuit Court of Baltimore City. After due notice thereof public sale of the aforesaid leasehold property was held at which sale Sun Land Corp., a body corporate of the State of Maryland, purchased said property and subsequently took title thereto, said sale having been ratified and confirmed by the Circuit Court of Baltimore City, without any objections to said proceedings having been filed by said Appellants or any other party. It will be noticed that the purchaser at said sale was not Pearson Sunderland, Jr., either individually or t/a Sun Land Corp. and, in fact, he never attended the sale. The said sale realized to Pyramid the amount of $5,310.62, although the then due balance of said mortgage at the time foreclosure proceedings were instituted was $8,322.61 and, in accordance with the hypothecation agreement, the sum pledged by the Appellants was applied on account of said deficiency.

Thereafter Appellants instituted legal proceedings against the Gayles in the People's Court of Baltimore City and thereafter by separate proceedings included Appellees Pyramid and Pearson Sunderland, Jr., individually and t/a Sun Land Corp. in said proceedings. Said proceedings were dismissed in the People's Court of Baltimore City when Appellant, Bernard J. Ohlendorf, failed to appear at the time set for trial. Appellants filed an appeal to the Baltimore City Court. After a complete hearing on said matter, said case having been tried *de novo* in accordance with Article 5, Section 30 of the aforesaid Maryland Code, 1968 Replacement Volume and Section 15-6, Baltimore City Public Local Laws, Everstine, 1969, Judge Anselm Sodaro found in favor of all defendants, which finding, it is submitted, was proper and in accordance with the facts. At said trial the Appellants presented evidence, had the right of cross examination and argument as to the facts and law. Appellants subsequently filed a motion for new trial and, after the same was

denied, filed a petition for writ of certiorari to the Maryland Court of Appeals which was denied by that Court without opinion.

QUESTIONS PRESENTED

The questions presented are really only four:

1. Was any Federal question presented under the facts of this case which would entitle the Appellants to a review by this Court?

2. Were the alleged Federal questions sought to be reviewed properly raised below?

3. Was any action taken by the lower Court or Courts a denial of due process as guranteed by the Fourteenth Amendment of the Constitution of the United States?

4. Do Sections 1 and 21 of Article 5 of the Annotated Code of Maryland (1957 Edition) 1968 Replacement Volume deny Appellants equal protection as provided for in the said Fourteenth Amendment of the Constitution of the United States?

On behalf of the Appellees it is submitted that the answers to all questions must be in the negative.

ARGUMENT

I.

NO FEDERAL OR CONSTITUTIONAL QUESTION IS PRESENTED BY THIS APPEAL.

The question of presentation of Federal or constitutional questions can be broken down into two parts as raised by the Appellants: (1) that Article 5, Sections 1 and 21 did not deny Appellants equal protection; and (2) that Appellants were not denied due process.

Concerning the equal protection question, one fails to see how Appellants can contend they were denied equal protection. The People's Court of Baltimore City has exclusive jurisdiction of all cases up to $1000.00 and concurrent jurisdiction with the lawcourts of Baltimore City on matters involving $1000.00 to $2,500.00. Baltimore City Public Local Laws, Everstine, 1969, Section 15-6, p. 79.

The appeals provisions of cases arising in the People's Courts are clearly set forth in Article 5, Sections 1 and 21 of the aforesaid Annotated Code of Maryland and Section 15-23 of the aforesaid Public Local Laws of Baltimore City p. 89. Appellants, as is admitted on page 10 of their Jurisdictional Statement, *chose* their tribunal and are bound by the rules and statutory limitations of the same. Everyone bringing suit in this tribunal suffers the same limitation with respect to ultimate appeal to the Court of Appeals although everyone utilizing the People's Court of Baltimore City has the right of appeal to the Baltimore City Court. Article 5, Section 30 Annotated Code of Maryland (1957 Edition) 1968 Replacement Volume, Section 15-23 Public Local Laws of Baltimore City p. 89. Therefore, it is submitted that there is no distinction as to class. As was said in *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 41 (1954):

> "The question before us is whether the procedure which has culminated in the dismissal of petitioner's appeal violates either the Due Process or the Equal Protection clause of the Fourteenth Amendment.
>
> "We have no difficulty with the Equal Protection Clause because no showing has been made that anyone comparably situated has been treated differently from the petitioner."

Nor is there any showing in the present case that Appellants have been treated differently from anyone availing

themselves of the People's Court or trial magistrate procedure. See also *Dohany v. Rogers*, 281 U.S. 362, 369 (1930), where this Court says:

> "Nor does the equal protection clause exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another."

Concerning the question of denial of due process, it should also be mentioned that the appeal procedure in Maryland where cases are instituted at the magistrate level is certainly not a denial of due process and even if no appeal were allowed this would not be a denial of due process no more than a denial of equal protection as previously discussed. See again *National Union of Marine Cooks and Stewards v. Arnold, supra*, where it is said at page 43:

> "While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process." (Citation omitted.)

See also *Dohany v. Rogers, supra*, where, in a suit by which plaintiff attempted to enjoin the State of Michigan from acquiring his land by a statute which he claimed unconstitutional and to have it condemned under a different statute, this Court stated at page 369:

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." (Citations omitted.)

In summary, with respect to the validity of Article 5, Sections 1 and 21 of the aforesaid Maryland Code, it is

submitted that inasmuch as all classes of litigants are treated equally under the terms thereof and in view of the decisions of this Court, there can be no denial of equal protection or of due process.

II.

THERE WAS NO DENIAL OF DUE PROCESS BY ANY LOWER COURT.

Concerning the many other allegations of due process, these are probably best answered by the language of this Court in *New York & New England Railroad Company v. Bristol*, 151 U.S. 556, 570 (1893):

> "As observed by Mr. Justice Miller in *Davidson v. New Orleans*, 96 U.S. 97, 104, the Fourteenth Amendment cannot be availed of 'as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, . . .'"

While this motion may not be the forum for the discussion of the substantive law of Maryland, some mention must be made of same to answer arguments II, III, IV, VI, VII and VIII of Appellant's Jurisdictional Statement as found on pages 11 through 15 of said Statement. As these arguments advance the same points, that the Appellants were denied due process and that the Judge was discriminatory in administration of the law, all arguments may be answered together. The facts show a sale from the Appellants to Gayles, a mortgage from Gayles to Pyramid, Appellants, as an inducement to Pyramid to make said loan, executing a hypothecation to Pyramid with the terms hereinbefore discussed. Default occurred, foreclosure proceedings were instituted and sale under the same was made to Sun Land Corp., said sale being ratified by the Circuit Court in which proceedings were brought. A deficiency occurred and, in accordance with the hypotheca-

tion agreement, money was withdrawn from Appellants' account to satisfy the deficiency. Certainly the purchaser, at foreclosure, is not subject to any action because there was a deficiency at sale, the sale being proper and without criticism as to proceedings and conduct, nor can the lending institution, because it availed itself of the benefit of the agreement Appellants voluntarily signed and without which the loan would not have been made, be subject to legal action. Appellants had no lien on this property, but even if they did see Tiffany *Real Property*, abridged edition, 1940, Section 934, page 1002.

> "It has been stated that the purchaser under a power of sale acquires the title which the mortgagor had at the time of executing the mortgage, unaffected by any subsequent transfer or lien. This is certainly true when the mortgagor vests legal title in the mortgagee since legal title vested in the mortgagee for certain purposes, including that of sale, cannot be divested by any equity subsequently occurring in favor of a third person."

While the decisions discussing this are many, it seems nothing more need be added.

One additional comment need be made. Appellants contend in their argument VI, page 14 of the Jurisdictional Statement, that the verdict of the Baltimore City Court is contrary to the well-settled law of Maryland citing reasons 4, 5, 6 and 10 of their petition for writ of certiorari, Jurisdictional Statement, page 4(a).

Answering reason 4, while a guarantor at times may have a right of subrogation, the following question arises here: Was this a true guarantee or were not Appellants entering this hypothecation agreement for their own benefit so that the sale could be consummated?

Reason 5 is just not the law of Maryland. 11 Maryland Law Encyclopedia, *Guaranty*, Section 9, page 440:

> "However, mere delay or promise to extend time, without consideration, is insufficient to discharge the guarantor, as is mere indulgence or forbearance in extending the time for payment or performance, not predicated on an actual agreement."

As to reason 6, it is questioned first if Appellants are parties in interest in a mortgage foreclosure. If they are, which is denied the Appellants merely having an agreement with Pyramid and no interest in the property, see *Chilton v. Brooks*, 71 Md. 445, 448:

> "1. Exception was taken because certain subsequent encumbrances were not made parties. This was untenable because the proceeding authorized by statute is wholly *ex parte* and without process; and other lien holders are allowed to come in by petition and assert their claims on the proceedings."

With respect to reason 10, it is felt that the above controverts some of Appellants' "law" and it is felt that perhaps Appellants, acting as their own counsel, may have been too close to the woods to see the trees.

While the Baltimore City Court based its decision on settled precedents and made the only possible decision, if it be assumed for the purpose of argument that this Court did err, it is here submitted that this, of itself, would not raise a Federal question. See, for example, *Conigan v. Buckley*, 271 U.S. 323, 331 (1926):

> "The defendants were given a full hearing in both courts; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoilation. (Citations omitted.) Mere error of a court,

> if any there be, in a judgment entered after a full hearing does not constitute a denial of due process of law."

See also *Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission*, 309 U.S. 30, 32 (1940) and *Worchester County Co. v. Riley*, 302 U.S. 292, 299 (1937):

> "Petitioner's real concern is that the judgment of the California court, if it should decide that decedent was domiciled there, may be erroneous or may conflict with that of the Massachusetts courts . . . In any case the Constitution of the United States does not guarantee that the decisions of the state courts shall be free from error." (Citations omitted.)

It is therefore submitted that Appellants having had a full day in court with all of the guarantees of a fair trial, and nowhere do Appellants contend the trial was not fair, there was no denial of due process, but rather, no other verdict could be granted. Additionally, it is submitted, that Appellants produced no evidence of word or deed showing a denial of due process by the Baltimore City Court.

Concerning Appellants' argument No. V, page 13 Jurisdictional Statement, the facts will indicate that on the day of trial Appellants failed to appear and the case was dismissed. It would appear that even if the court were hasty in its dismissal, Appellants could have immediately refiled their proceedings in the People's Court or taken the alternative which they chose and filed an appeal which, as stated, granted them a full trial on the merits. Appellants, having an alternative of remedies, certainly cannot claim that they were denied any due process.

III.

THE ALLEGED FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NOT PROPERLY RAISED BELOW.

As was stated in *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937):

> "Before we may undertake to review a decision of the court of a state, it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause."

The first question which must be decided is at what level should any alleged Federal question have been presented? Under Article 5, Sections 1, 21 and 30 of the Annotated Code of Maryland (1957 Edition) 1968 Replacement Volume, it appears obvious that while the Baltimore City Court tried this case *de novo*, this was the appellate level, and, therefore the "highest court of the state having jurisdiction" would be the Baltimore City Court. Appellants, in their Jurisdictional Statement, showed no evidence of the presentation at that level of any Federal question.

If it should be decided that the highest court having jurisdiction is the Maryland Court of Appeals, then it should be noted that Appellants, in their petition for writ of certiorari, failed to include any reference to Article 5, Sections 1 and 21 of the Maryland Code and any question that this statute denied equal protection under the Fourteenth Amendment.

The only two alleged Federal questions in the petition for writ of certiorari (Jurisdictional Statement page 4(a)) were: Reason No. 1 — The action of the People's Court denied due process which is fully answered in this motion

on page 10; and Reason No. 3 — That that conclusion of the Baltimore City Court was a denial of due process, which, it is felt, has been amply answered, there being no cause of action by the Appellants against any of the Appellees.

In conclusion, it should be stated that the Honeyman case requires that not only must the Federal question be submitted to the highest court for decision, but "that its decision of the Federal question was necessary to the determination of the cause." It is submitted that under the facts of this case the Court of Appeals of Maryland or the Baltimore City Court could easily determine this cause without the necessity of deciding any Federal question.

CONCLUSION

For the foregoing reasons stated it is respectfully requested that this Court dismiss the appeal presented or, in the alternative, affirm the judgment of the Baltimore City Court and the action of the Court of Appeals of Maryland.

Respectfully submitted,

JOHN C. GRIFFIN,

GEORGE W. DELLA,

Attorneys for Appellees.